83-2096

No.

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CAMERON CRANK,
PETITIONER

v.

TEXAS STATE BOARD OF DENTAL EXAMINERS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTION PRESENTED

Whether the due process rights guaranteed by the Constitution are violated where, at a hearing to revoke petitioner's license to practice dentistry, his counsel was permitted to withdraw, but the petitioner was denied a continuance for the purpose of obtaining new counsel, and was forced to proceed without representation at the hearing.

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John Cameron Crank petitions for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

OPINIONS BELOW

The Texas Supreme Court entered an opinion February 1, 1984 and, following the grant of a motion for rehearing, withdrew the slip opinion of its February 1 opinion and rendered a second opinion March 21, 1984. The February 1, 1984 opinion is reported at 37 Tex. 191, and, evidently, is not reported in the Southwest Reporter (Pet. App. B). The March 21, 1984 opinion is reported at 27 Tex. 287, 666 S.W.2d 91 (1984) (Pet. App. A). The opinion of the Court of Appeals, Twelfth Supreme Judicial District, Tyler is reported at 658 S.W.2d 182 (1983) (Pet. App. C).

JURISDICTION

The judgment of the Supreme Court of Texas was

entered March 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case presents an important and unresolved question of the boundary between the constitutionally guaranteed right of due process and right to counsel and the scope of this Court's opinion last Term in *Morris v. Slappy*, ____ U.S. ____, 103 S. Ct. 1610, 51 U.S. Law Week 4399 (decided April 20, 1983). The facts presented here fall far closer to the heart of the constitutional rights than those addressed in *Morris* and thus leave open a need for delineation by the Court.

The petitioner, a dentist, was accused of prescribing a controlled and addictive narcotic, in violation of federal and state laws governing dangerous substances and in violation of proper conduct as a dental licensee in Texas. Two formal complaints were brought against him by the respondent, the Texas State Board of Dental Examiners (the "Board"). The Board is an administrative agency which regulates licensure of Texas dentists. In essence, petitioner was accused of giving prescriptions for massive amounts of Dilaudid to certain patients and, in one instance, to a person who had never been a patient. The petitioner received notice of the first complaints October 9, 1979, and of the second complaint on March 27, 1980. Petitioner sought and received two continuances on the first complaint with the hearing then being set for February 29, 1980. The Board then unilaterally rescheduled this hearing at its own initiative from February 29, 1980 to March 1, 1980. Petitioner and his counsel appeared in Houston, Texas on March 1, 1980 at the time and place scheduled for the hearing and were then prepared to defend the charges. The Board, however, which was sitting in Houston, Texas, the home of petitioner, postponed the hearing due to the absence of a witness and set a rescheduled hearing, on both comlaints, in San Antonio,

Texas, for May 9, 1980. On April 28, the Board received a request from petitioner's counsel seeking a continuance of both hearings. This was, therefore, the first request for a continuance on the second complaint. It was also the third request by petitioner for a continuance of the other complaint, there having been an intevening continuance at the Board's initiative. The Board denied the April 28 requests.

On the day prior to the May 9 hearing, Martin Nathan, an attorney who had been requested by petitioner to take over his defense, telephoned counsel for respondent. Nathan informed Gauss that Nathan could accept the representation only if permitted an opportunity to prepare the case. On the morning of the hearing, petitioner and his then counsel appeared. Petitioner stated to the Board that, while his counsel "is a very fine attorney, we have reached philosophical differences in our approach to this case."

He stated his wish to substitute Nathan and indicated that Nathan had agreed, but only if allowed to prepare the case. Petitioner alluded to his prior readiness at the March 1 hearing and the Board's rescheduling at that time. He requested a continuance to enable Nathan to prepare himself.

The Board's counsel opposed the continuance, stating among other things,

> "*Now, I don't know what their philosophical differences are and frankly, could not care less at this point.* [Emphasis added]

And,

> "*I am in full and wholehearted support of [petitioner's] analysis of this case; that the charges are very serious.* If we are successful in persuading the Board that the charges are true and accurate, then it would seem to me that [petitioner] is probably a menace to society... [Emphasis added.]
>
> *I fully realize that in the present state of the matter if we go*

> *forward with this [hearing], that [petitioner] is going to be naked; he's going to be without counsel as I understand it...* [Emphasis added.]
>
> "[Petitioner's] prior counsel will not represent him, Mr. Nathan has not been retained as of this point [,] so there is no lawyer to represent [petitioner] in this matter, in this hearing.
>
> "Nevertheless, we feel like that is something of [petitioner's] doing. He has not been deprived of the opportunity to obtain Counsel. That opportunity has been given to him and he has had that full opportrunity. [...]
>
> *If proceeding with this matter, at this time, is a deprivation of Due Process of Law, then so be it.* I don't think it is under the circumstances...." [Emphasis added.]

Thereafter, the Board denied the requested continuance.

Counsel for petitioner requested the Board's permission to withdraw and asked the Board to note that the withdrawal was at the request, and with the consent, of the petitioner. The Board consented to the withdrawal of counsel and recessed briefly, after which the Board confirmed its prior decision and unanimously refused a further continuance.

The hearing proceeded in the petitioner's presence but without benefit of counsel for petitioner. Petitioner complained further of being without effective counsel.

The administrative hearing record is rife with proof that petitioner's complaints were justified. Two instances are noted:

After a witness was passed to petitioner for any questions, the Board's attorney interjected:

> "I think, Mr. President, at this time, that it probably is true—while the Respondent is not represented by Counsel, I think that he should be warned that he doesn't have to say anything, particularly, if what he says could possibly tend to convict him of a commission of a crime.
>
> "He has the Fifth Amendment protection and I think

that, certainly, if he were represented by Counsel that he would be so advised.

"I think it would be proper for this Board to advise it. He may ask cross examination type questions if he sees fit to do so. I believe he said he had none."

Again, when the Board's attorney sought to introduce a package of nearly 200 prescriptions for Dilaudid, petitioner was asked whether he acknowledged the prescriptions as his. There followed this remarkable exchange:

"[Petitioner]: Of these prescriptions, I wrote three of them. The others are obvious forgeries.

"[Presiding Board President]: You're saying that you wrote three and the others are forgeries?

"[Petitioner]: That's correct.

"[Counsel for the Board]: I think, Mr. President, that that will go the weight. These are the originals. It does certainly appear—We can see that it appears that the signature of [Petitioner] on three of these are identical; one being the prescription that was delivered to [a witness].

"We know that one is genuine. We submit that the rest of the prescriptions, except for the signature—and the Board can look at this and look at these and make a determination.

"I think that it's obvious that everything except the signature is in the same handwriting.

"[Presiding Board President]: Can [Petitioner] acknowledge which one of these is his? Would you do that, [Petitioner]?

"[Petitioner]: All right.

"[Counsel for the Board]: Well, why don't we do it this way. These are photostats. In order to be able to identify

which ones they are, I think probably they are 1, 11 and 16.

"[Petitioner]: These are the three that I wrote. The rest of these, none of the writing on the pieces of paper is my handwriting; not only is the signature not mine, the rest of the prescription is not in my handwriting. Anybody can see that."

The Board found petitioner guilty of all charges and voted unanimously to revoke his license to practice. An appeal was taken to the District Court of Harris County, Texas, which, applying a substantial evidence rule to administrative determinations, upheld the Board's action. The Texas court of appeals reversed, holding that petitioner was denied due process of law. The Texas Supreme Court reversed the court of appeals, stating that it could not say the Board's denial of a continuance was arbitrary.

(Petitioner was also indicted and tried in a Texas criminal court basically upon the same factual allegations which formed the basis of the Board's complaint. His conviction was ultimately set aside at the state's own initiative for lack of evidence.)[1]

REASONS FOR GRANTING THE PETITION

1. The right to counsel in criminal cases is both explicit in the fifth amendment and so well established as to be axiomatic in the concept of our system of justice. *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Powell v. Alabama,* 287 U.S. 45 (1932). This Court has, however, apparently never specifically held in a civil case that the right to counsel is implicit in the concept of the fifth amendment right to due process. On this basis alone, this case is a significant opportunity for this Court to state explicitly what it has previously indicated in the dicta of certain criminal

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[1]Harris County Criminal District Court, No. 300510, Dismissed September 15, 1980.

cases. *See, e.q., Powell v. Alabama, supra; Cooke v. United States,* 267 U.S. 517 (1925); cf., *Goldberg v. Kelly,* 397 U.S. 254 (1970).

2 It would not seem appropriate for so important a concept of constitutional dimension to be without authoritative guidance from this Court. This is not to suggest that the right to counsel in civil cases is without recognition by the lower courts. In the federal system, the Fifth Circuit, for example, has made recent, explicit statements on the issue. *Mosley v. St. Louis Southwestern Ry.*, 634 F. 2d 981 (1981), *cert. denied,* 452 U.S. 906 (1981); *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (1980), clearly indicating the view that the right to retained counsel is an inherent element of due process. But if it be assumed that a civil litigant's right to retained counsel is constitutionally mandated, this Court's opinion in *Morris v. Slappy, supra,* poses the need for guidance for the civil arena just as its opinion in that case made clear that the right to counsel in a criminal case had certain limitations. The Texas Attorney General argued, and the Texas Supreme Court appears to have accepted, that this Court's announcement that "broad discretion must be granted trial courts on matters of continuances" is rationally applied to the circumstances faced by the petitioner.

That such an application could have been made underscores a certain urgency for this Court's further determination. In *Morris,* the petitioner was in fact represented by counsel through all stages of the trial. The issue was not whether he was entitled to counsel but whether the Constitution mandated that he be afforded the right to be represented by an appointed counsel who, having been assigned to the case, was unable to appear due to illness. Moreover, in *Morris* the substituted counsel (1) was deemed qualified by the petitioner himself, (2) announced to the Court that he was adequately prepared for the defense, and (3) was held by this Court to have performed his function to sufficiently high standards as to obtain an acquittal for his client on the major count against him. Finally, in *Morris,* the petitioner insisted that his counsel be changed in mid trial.

Here, petitioner was, as the Board's own counsel put it, "naked" in his own defense. The Board's counsel urged a

mechanical application of the Board's rules for requesting continuances—despite the fact that the record shows that the problems giving rise to petitioner's differences with his counsel occurred a day prior to the hearing and thus making impossible strict adherence to a requirement for five days' written notice.[2]

3. This Court in *Morris* admonished that criminal trials are not "games." The Board and the courts below were urged to view petitioner's request for counsel of his choice to be a game as well. Although not so characterizing petitioner's motion for a continuance, the reference to earlier continuances and the asserted failure of petitioner to show that his absence of counsel was not due to his own fault or negligence would seem to imply that gamesmanship was employed. The record would suggest the contrary. Petitioner appeared at the March 1 hearing ready to proceed. The nature of the differences of "philosophy," in any event, were beyond the assistant attorney general's stated level of concern and the Board was informed that a due process violation was occuring. If, therefore, a game was occurring, it was played by the Board and was one in which petitioner's ability to practice his profession was the macabre trophy sought.

4. In every denied request for a continuance, there inheres a balance test between the rights of an individual to access to a fair trial and the need for an orderly administration of justice. That test of necessity is administered at the first instance by the presiding judge or administrative official. The need to repose a certain discretionary authority is recognized, *Ungar v. Sarafite*, 376 U.S. 575 (1964), and, in the legal words of art which have arisen to describe it; the courts will not set asside the exercise of that discretion until and unless it amounts to "an abuse of discretion." Despite the essential subjectivity of an analysis of abusive discretion, the facts in this case remain (1) no inquiry

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[2]A requirement, which the Board did not feel constrained to apply mutually when it continued the case March 1 with no prior notice to petitioner.

was made as to the nature of the petitioenr's felt need to obtain a different lawyer, (2) documents which were not authenticated and which were denied by petitioner as "obvious forgeries"—a fact which the record seems to reflect as accepted—were considered by the Board, raising self-evident due process questions in its own right, (3) petitioner was warned that his statements at trial could be held against him, thus chilling whatever propensity he might have had to conduct an active defense in his own behalf, and (4) the devastating effect of the failure to have counsel is simply shown in the differing results between the civil case—in which he was unrepresented and lost—and the criminal case—in which he was represented and won.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES D. REED